

CAROLINE L. FOWLER, City Attorney (SBN 110313)
JOHN J. FRITSCH, Assistant City Attorney (SBN 172182)
City of Santa Rosa
100 Santa Rosa Avenue, Room 8
Santa Rosa, California 95404
jfritsch@srcity.org
Telephone: (707) 543-3040
Facsimile: (707) 543-3055

Attorneys for Defendants
CITY OF SANTA ROSA; ED FLINT, an individual and former Chief of the
SANTA ROSA POLICE DEPARTMENT; SRPD Sgt. RICHARD CELLI,
SRPD Officers RYAN HEPP, BRENT JOLIFF, TIMOTHY GILLETTE,
ADRIA COOPER and MARLEE WELLINGTON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALBERT THOMAS RUIZ III,

Plaintiff,

v.

CITY OF SANTA ROSA, former SRPD
Chief ED FLINT, SRPD Officer RYAN
HEPP, SRPD Sgt. RICHARD CELLI,
Officers BRENT JOLIFF, TIMOTHY
GILLETTE, ADRIA COOPER, MARLEE
WELLINGTON, and DOES 1 to 5,
inclusive,

Defendants.

Case No. CV 09-3952 VRW

**DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**
[FRCP 56]

[DEMAND FOR JURY TRIAL]

Date: June 17, 2010
Time: 10:00 a.m.
Ctrm: 6
Judge: The Honorable Vaughan
Walker

Trial Date: None

TABLE OF CONTENTS

		<u>Page</u>
1		
2		
3	MEMORANDUM OF POINTS AND AUTHORITIES	1
4	STATEMENT OF PLEADINGS	1
5	STATEMENT OF FACTS	2
6	LEGAL ANALYSIS	7
7	Legal Standard for Summary Judgment	7
8	ISSUES	9
9	A. OFFICER HEPP'S USE OF FORCE WAS OBJECTIVELY REASONABLE	
10	AND CONSISTENT WITH PROPER POLICE PROCEDURE	9
11	B. IF THE COURT CONCLUDES THAT A CONSTITUTIONAL VIOLATION	
12	OCCURRED, OFFICER HEPP IS ENTITLED TO APPLICATION OF	
13	QUALIFIED IMMUNITY AND DISMISSAL OF THE COMPLAINT	11
14	1. City Did Not Maintain a Policy, Custom or Practice, or Ratify or	
15	Condone Violative Conduct, Encouraging Excessive Force	12
16	2. Neither CITY nor Officer HEPP violated the Bane Act	13
17	3. Officer HEPP Did Not Commit Common Law Battery	13
18	4. There is no Triable Issue of Fact Material to Plaintiff's Violation of	
19	the Convention Against Torture Count	14
20	CONCLUSION	15
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Page(s)

Federal Cases

<i>Adickes v. S .H. Kress and Co.</i> , 398 U.S. 144, 157, 90 S.Ct. 5098, 26 L.Ed.2d 142 (1970)	7
<i>Al-Saher v. I.N.S.</i> , 268 F.3d 1143 (9th Cir.2001)	14
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)	8, 9
<i>Blue Ridge Insurance Co. v. Stanewich</i> , 142 F.3d 1145 (9 th Cir. 1998)	8
<i>Boyd v. Benton County</i> , 374 F.3d 773 (9 th Cir.2004)	12
<i>British Airways Board v. Boeing Co.</i> , 585 F.2d 946 (9 th Cir. 1978)	8
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 323, 106 S.Ct. 2548 (1986)	7
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)	8
<i>Graham v. Conner</i> , 490 U.S. 386 (1989)	9
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)	12
<i>Kamalthas v. I.N.S.</i> , 251 F.3d 1279 (9th Cir. 2001)	14
<i>KRL v. Estate of Moore</i> , 512 F.3d 1184 (9 th Cir. 2008)	11
<i>Long v. County of Los Angeles</i> , 442 F.3d. 1178 (9 th Cir. 2006)	7
<i>Lynn v. Sheet Metal Workers Int’l Ass’n</i> , 804 F.2d 1472 (9 th Cir. 1986)	8
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986)	11
<i>Martinez v. City of Los Angeles</i> , 141 F.3d 1373 (9 th Cir. 1998)	7
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	8
<i>Mitchell v. Forsyth</i> , 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)	12
<i>Monell v. New York Department of Social Services</i> , 436 U.S. 658 (1978)	2
<i>Nadell v. Las Vegas Metro. Police Dep’t</i> 268 F.3d 924 (9 th Cir. 2001)	12
<i>Pearson v. Callanan</i> , –U.S.–, 129 S. Ct. 808 (2009)	11
<i>S.E.C. v. Seaboard Corp.</i> , 677 F.2d 1301 (9 th Cir. 1982)	8
<i>Saucier v. Katz</i> , 533 U.S. 194, 205, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)	11

1	<i>Scott v. Henrich</i> , 39 F.3d 912 (9th Cir. 1994)	10, 12
2	<i>Smith v. City of Hemet</i> , 394 F.3d 689 (9 th Cir. 2005)	9
3	<i>Toscano v. Profe'l Golfers Ass'n</i> 258 F3d 978 (9th Cir. 2001)	7
4	<i>Van Ort v. Estate of Stanewich</i> , 92 F.3d 831 (9 th Cir. 1996)	12
5	<i>Wilson v. Layne</i> , 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)	11
6	<u>State Cases</u>	
7	<i>Brown v. Ransweiler</i> (2009) 171 Cal.App.4th 516	13
8	<u>Federal Statutes, Rules and Regulations</u>	
9	Federal Rule of Civil Procedure 56	1, 7, 8
10	42 U.S.C. §1983	2, 12
11	8 C.F.R. 208.18(a)(1)	14
12	<u>State Statutes</u>	
13	California Civil Code § 52.1	2, 13
14	California Penal Code § 148(a)1	4
15	California Penal Code § 3056	4
16	California Penal Code § 594(b)(4)	4
17	California Penal Code § 647(f)	4
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 TO PLAINTIFF ALBERT THOMAS RUIZ III AND HIS ATTORNEY OF RECORD:

2 Please take notice that on June 17, 2010 at 10:00 a.m. or as soon thereafter as the
 3 matter may be heard in the above-entitled court, located at 450 Golden Gate Avenue,
 4 Courtroom 6, 17th Floor, San Francisco, California, 94102, the defendants, jointly and
 5 severally, will move the court for summary judgment pursuant to Federal Rule of Civil
 6 Procedure 56 in their favor against plaintiff on the grounds that defendants Officer
 7 RYAN M. HEPP and CITY OF SANTA ROSA did not violate the constitutional rights of
 8 ALBERT THOMAS RUIZ III, and/or is entitled to qualified immunity, and/or is not
 9 subject to municipal liability.

10 This motion is based on this notice, the memorandum of points and authorities
 11 filed herewith, the Declarations of John J. Fritsch, Officer RYAN M. HEPP, and Joseph
 12 Callanan, Jr. and exhibits attached thereto, and the pleadings and papers filed herein.

13 OFFICE OF THE CITY ATTORNEY

14 /s/

15 Dated: May 5, 2010

16 _____
 17 John J. Fritsch
 18 Assistant City Attorney
 Attorney for Defendants
 CITY OF SANTA ROSA; SRPD Officer RYAN
 HEPP

19
 20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 Defendant Santa Rosa Police Department Officer RYAN M. HEPP (HEPP), and
 22 the CITY OF SANTA ROSA (CITY) respectfully submit this Memorandum in support of
 23 Motion for Summary Judgment.

24 **STATEMENT OF PLEADINGS**

25 Plaintiff RUIZ alleges via Judicial Council form complaint in the Superior Court
 26 of California that Sgt. Celli “employed his taser excessively and unnecessarily”; that
 27 Officer HEPP “punched Plaintiff 4 or 5 times in the face”; that Sgt. Celli, former Chief
 28 Ed Flint and other named Defendant Officers “conspired together to beat Plaintiff in

1 violation of 42 U.S.C. §1983, common law battery, California Civil Code § 52.1 and the
 2 Convention against Torture; that the individuals were acting in course and scope of
 3 employment by CITY; and that the “illegal actions are part of a pattern and practice of
 4 the Santa Rosa Police Department”. (*Monell v. New York Department of Social Services* 436
 5 U.S. 658 (1978))

6 Defendants filed a Notice of Removal on August 26, 2009.

7 Defendants separately allege via the Answer on file that the officers deny the
 8 allegations that they acted unreasonably to detain and use force; and that if the court
 9 concludes that an officer used excessive force, that the officer is entitled to the
 10 affirmative defense of qualified immunity. The City denies that City maintained an
 11 offensive policy, custom or practice, or that the City ratified or condoned unlawful
 12 conduct. (Exhibit “A” to the Declaration of John J. Fritsch: Defendants’ Answer to
 13 Complaint)

14 Plaintiff RUIZ stipulated to the dismissals of ADRIA COOPER; MARLEE
 15 WELLINGTON; BRENT JOLIFF; TIMOTHY GILLETTE; former Chief of Police ED
 16 FLINT; and Sgt. RICH CELLI.

17 STATEMENT OF FACTS

18 Plaintiff RUIZ, then age 32, began his day on May 5, 2008, Cinco de Mayo, at his
 19 mother Mary Ray’s house at 2474 Big Oak Dr., Santa Rosa, California. Plaintiff RUIZ
 20 then visited his grandmother about a mile and a half down the road at about 1:00 p.m.
 21 and then he had lunch at about 2:00 p.m. He then went to Macquino Andrade’s house
 22 in the neighborhood of Steele Lane and Marlow to drink beer. (Exhibit “B” to the
 23 Declaration of John J. Fritsch: Deposition Transcript of Albert Thomas Ruiz III 37-9:40-2)

24 Before his encounter with Santa Rosa Police Department officers, plaintiff RUIZ
 25 had had about five 12 ounce Modelo beers. (DT of RUIZ 24-5:21)

26 Plaintiff RUIZ left Andrade’s house on his bicycle to get more Modelo beer from
 27 the 7-Eleven store on West Steele Lane (DT of Ruiz 41-20:42-19) West Steele Lane is a
 28 two lane road with bike lanes, and an additional turn lane at the intersection with Apple

1 Valley Lane. (Ex. "C" to the Declaration of John J. Fritsch: Deposition Transcript of
 2 Chris Smotherman13-19:15-23 and Ex. "B"-aerial image of location) The lighting
 3 conditions were fine (DT of Ruiz 42-23:43-10) Plaintiff RUIZ purchased a six pack of
 4 Modelo at the 7-Eleven, and he began to ride westbound back to Andrade's house on
 5 West Steele Lane with a bag containing a six pack of Modelo beer in one hand, an iPod
 6 in the other hand, and no hands on the bicycle. Just after crossing the intersection with
 7 Apple Valley Lane, plaintiff RUIZ lost control of his bicycle and crashed, breaking three
 8 of the Modelo bottles. Plaintiff RUIZ abandoned the three unbroken bottles, and
 9 returned to the 7-Eleven, purchased another six pack of Modelo, and began to ride back
 10 to Andrade's house whereupon he "wrecked in the same exact location twice." Plaintiff
 11 RUIZ does not know the fate of the bottles. (DT of RUIZ 43-17:48-13)

12 After the second crash, plaintiff RUIZ was so angry he wanted to encourage
 13 some form of physical altercation with someone. A tree stake was supporting a CITY
 14 tree nearby, and plaintiff RUIZ broke it off near ground level. (DT of RUIZ 48-11:23; Ex.
 15 "B" to RUIZ Deposition: images of circled broken tree stake) He stood in the middle of
 16 street swinging the tree stake, and began yelling curses directed at cars and people (DT
 17 of RUIZ 49-16: 50-25)

18 Sgt. Rich Celli

19 Concurrently, Sgt. Rich Celli was working as a patrol supervisor in a marked
 20 Santa Rosa Police Department patrol car and in full uniform, and proceeding eastbound
 21 on West Steele Lane. (Ex. "D" to the Declaration of Ryan Hepp: Incident/Investigation
 22 Report 08-0007012) Sgt. Celli observed plaintiff RUIZ stagger in the westbound lane;
 23 grab the tree stake; and begin swinging the stake at passing vehicles. Sgt. Celli exited
 24 his car, approached RUIZ and ordered him to submit to arrest (vandalism and obvious
 25 intoxication) RUIZ stated "I'm not doing nothing, what are you gonna do?" Sgt Celli
 26 repeated the order. RUIZ again refused. Sgt. Celli deployed an X26 taser in dart probe
 27 mode: the dart probes struck plaintiff RUIZ in his right breast and right lower abdomen
 28 (DT of RUIZ 66-15:68-15; DT of RUIZ: Ex."A" lower image depicting plaintiff RUIZ

1 post-arrest showing dart probes in right breast and lower abdomen and upper image
2 depicting bag with beer bottles, planting strip and remains of broken stake in ground).

3 Plaintiff RUIZ fell to the ground. Sgt. Celli ordered RUIZ to submit to arrest and
4 remain prone. After the taser pulse stopped, plaintiff RUIZ began to try to get to his
5 feet, and Sgt. Celli energized the taser again. Plaintiff RUIZ was handcuffed, and
6 arrested for violations of California Penal Code §§ 148(a)1 (resisting arrest); 594(b)(4)
7 (vandalism); 647(f) (public intoxication); and 3056 (parole violation).

8 Officer HEPP

9 Officer HEPP arrived on scene and observed plaintiff RUIZ in handcuffs, and
10 that he was verbally aggressive and yelling vulgarities (HEPP Supplemental Report
11 attached to Incident/Investigation Report 08-0007012). Plaintiff RUIZ was placed in the
12 back of a patrol car, and then taken out for images to be taken of him. (DT of RUIZ 62-
13 17:64-21) After that, Officers HEPP and Wellington escorted plaintiff RUIZ toward
14 Wellington's patrol car in double rear wrist locks to be taken to Sonoma County
15 Detention Center. (HEPP Supplemental Report attached to Incident/Investigation
16 Report 08-0007012)

17 At the right rear door of Officer Wellington's car, plaintiff RUIZ said "'I want to
18 know what I'm under arrest for," what my charges are." (DT of RUIZ 64-25:65-18)
19 Plaintiff RUIZ testified that Officer HEPP then said "Get in the car" and that plaintiff
20 RUIZ responded "'Look, I have a right to know what I'm being arrested for.'" (DT of
21 RUIZ 65-19:21) Officer HEPP reported that Officer HEPP opened the rear right door of
22 the patrol car and told plaintiff Ruiz to sit down. Plaintiff Ruiz looked at Officer HEPP
23 with a blank stare. Office HEPP told Officer Ruiz a second time "Sit down!" Plaintiff
24 Ruiz flexed his muscles in his arms, and locked out his knees as he wedged his body,
25 neck and shoulder against the door frame of the vehicle refusing to enter the back seat.
26 (HEPP Supplemental Report attached to Incident/Investigation Report 08-0007012)

27 Describing physical resistance, plaintiff RUIZ testified as follows:

28 Q. Going back to being at that right-rear door of the police cruiser, Officer

Wellington's present, Officer Hepp is present. Did you wedge your body against the door frame to prevent them from putting you in the car?

A. I can't recall. I don't really understand the question "wedge" Like brace myself?

Q. Yeah. Did you brace yourself in a way that would make it difficult for them to put you in the back of the car?

A. That's quite possible. (DT of RUIZ 95-5:15)

Officer HEPP reported that he placed his hand on plaintiff RUIZ's left shoulder and tried to push down as he yelled "Sit down, now!" and plaintiff RUIZ yelled "Make me". (HEPP Supplemental Report attached to Incident/Investigation Report 08-0007012)

Describing the exchange, plaintiff RUIZ testified as follows:

Q. Okay. Before—after you arrived at the open car door and before you sat in the car, did anyone put any weight on your shoulders with their hands and try to get you—push you down into the car?

A. That might have been—that could have happened, yeah, like, "Get in the car"--

Q. (Witness nods head)

A. --on the shoulder, you know, "Get in the car." But I saw saying, "I want to know what my charges are. What am I under arrest for? I have a right to know that," (DT of RUIZ 80-8:19)

Q. Okay. When—and I'm not sure if you have a specific recall or not. But when force was applied to your shoulder to push you down, did you respond to that in any way? Did you resist it?

A. Well, yeah. I was still standing. How can you make someone sit with one hand? I mean, really. So,--

Q. Was the hand put on your shoulder and you being pushed down into the car, was that occurring at the time that you were asking about what the charges were?

A. Yes. (DT of RUIZ 81-16-8:82-2)

Q. Did Officer Hepp say to you, Sit down in the car, and did you reply, Make me?

A. I might have said "You're going to have to make me, and I have a right—I wanted my questions answered is why"

1 Q. Understood

2 A. And—and I might have said something to that degree, yes.” (DT of RUIZ
3 95-18:25)

4 Officer HEPP reported that plaintiff RUIZ then turned toward HEPP in an
5 aggressive pose, and then looked directly at Officer HEPP and pursed his lips together
6 as if about to spit on Officer HEPP. (HEPP Supplemental Report attached to
7 Incident/Investigation Report 08-0007012).

8 Describing his movements, plaintiff RUIZ testified as follows:

9 Q. Okay. They—Officer Hepp ordered you to get in the car; am I right?

10 A. Yes.

11 Q. Did you get in the car in response to that order?

12 A. No.

13 Q. Was there a reason why?

14 A. ‘Cause I wanted some answers.

15 Q. Okay. Did you—Officer Hepp felt that you were—strike that. Did you at
16 any time purse your lips as if you were going to spit?

17 A. No.

18 Q. Did you turn to towards Officer Hepp?

19 A. To make eye contact, yes.

20 Q. Okay. That occurred as you were being put in the back of the car?

21 A. Yes. (DT of RUIZ 76-6:23)

22 Based on plaintiff RUIZ’s uncooperative behavior and expressed aggression,
23 Officer HEPP believed that plaintiff RUIZ was about to assault Officer HEPP with a
24 shoulder or head butt. Officer HEPP immediately recognized the threat and initiated a
25 single open hand palm heel strike to plaintiff RUIZ’s midsection (stomach area) with his
26 right hand. The strike did not slow plaintiff Ruiz as he continued turning toward
27 Officer HEPP and yelled. The single heel strike to his torso did not seem to affect
28 plaintiff Ruiz who looked directly at Officer HEPP and pursed his lips together as if

1 about to spit on Officer HEPP. Officer HEPP quickly struck plaintiff Ruiz in the face
 2 two times with a palm heel strike. Plaintiff Ruiz immediately stepped back, fell down
 3 into the rear seat of the patrol car, and was secured in the back seat. (HEPP
 4 Supplemental Report attached to Incident/Investigation Report 08-0007012)

5 After the encounter, plaintiff RUIZ had a bloody nose and lip. By the time he
 6 arrived at Sonoma County Detention Center after the encounter, his blood had
 7 coagulated and he was no longer bleeding. **He never obtained any health care for a**
 8 **bloody nose and lip.** He was not in pain. (Ex. "A": DT of RUIZ 25-24:27-22; 28-22: 30-6)

9 After the encounter, Officer Wellington drove plaintiff RUIZ to the Sonoma
 10 County Detention Center, a five to ten minute trip. During the ride, plaintiff RUIZ
 11 asked Officer Wellington if he could get her number and give her a personal call
 12 sometime (Ex. "A": DT of RUIZ 84-3:86-6)

13 LEGAL ANALYSIS

14 Legal Standard for Summary Judgment

15 Summary judgment is appropriate where there is no genuine dispute as to
 16 material facts and the movant is entitled to judgment as a matter of law". Fed.R.Civ.P.
 17 56(c). *Toscano v. Profe'l Golfers Ass'n* 258 F3d 978, 982 (9th Cir. 2001) A dispute as to a
 18 material fact is genuine if there is sufficient evidence for a reasonable jury to return a
 19 verdict for the non-moving party. *Long v. County of Los Angeles*, 442 F.3d. 1178, 1185 (9th
 20 Cir. 2006). A party seeking summary judgment bears the initial burden of informing the
 21 court of the basis for its motion and of identifying those portions of the pleadings and
 22 discovery responses that demonstrate the absence of a genuine issue of material fact.
 23 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986).

24 The burden of demonstrating the absence of a genuine issue of material fact lies
 25 with the moving party, and for this purpose, the material lodged by the moving party
 26 must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H.*
 27 *Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 5098, 26 L.Ed.2d 142 (1970); *Martinez v. City of*
 28 *Los Angeles*, 141 F.3d 1373, 1378 (9th Cir. 1998).

1 A material issue of fact is one that affects the outcome of the litigation and
2 requires a trial to resolve different versions of the truth. *Lynn v. Sheet Metal Workers Int'l*
3 *Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th
4 Cir. 1982).

5 If the moving party presents evidence that would call for judgment as a matter of
6 law at trial if left uncontroverted, then the respondent must show by specific facts, the
7 existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250,
8 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "There is no issue for trial unless there is sufficient
9 evidence favoring the non-moving party for a jury to return a verdict for that party. If
10 the evidence is merely colorable, or is not significantly probative, summary judgment
11 may be granted." *Id.*, at 249-50 (citations omitted). "A mere scintilla of evidence will
12 not do, for a jury is permitted to draw only those inferences of which the evidence is
13 reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing*
14 *Co.*, 585 F.2d 946, 952 (9th Cir. 1978); see also, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
15 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

16 If the factual context makes the non-moving party's claim of a disputed fact
17 implausible, then that party must come forward with more persuasive evidence than
18 otherwise would be necessary to show there is a genuine issue for trial. *Blue Ridge*
19 *Insurance Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998). When the moving part has
20 carried its burden under Rule 56(c), its opponent must do more than simply show that
21 there is some metaphysical doubt as to the material facts...Where the record taken as a
22 whole could not lead a rational trier of fact to find for the nonmoving party, there is no
23 "genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
24 585-587 (1986).

25 Once the moving party meets the requirement of Rule 56 by either showing that
26 no genuine issue of material fact remains or that there is an absence of evidence to
27 support the non-moving party's case, the burden then shifts to the party resisting the
28 motion, who "must set forth specific facts showing that there is a genuine issue for

trial.” *Anderson, supra*, 477 U.S. 242 at p. 250. It is not enough for the party opposing a properly supported motion for summary judgment to “rest on mere allegations or denials of his pleadings.” *Id.*, 91 L.Ed.2d, at 217.

ISSUES

A. OFFICER HEPP’S USE OF FORCE WAS OBJECTIVELY REASONABLE AND CONSISTENT WITH PROPER POLICE PROCEDURE

An excessive force claim is analyzed under the Fourth Amendments “objective reasonableness” standard. *Graham v. Conner*, 490 U.S. 386, 388 (1989). The inquiry requires “attention to the facts and circumstances of each particular case including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* These facts should be considered in relation to the amount of force used. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005).

The “escalation of force” spectrum employed by Officer HEPP spanned from the level of uniform presence, verbal tactics, firm grip/gesture (shoulder pressure) to the intermediate level of physical force. Officer HEPP continued with verbal commands throughout the encounter, and plaintiff RUIZ was instructed to enter the car repeatedly although plaintiff RUIZ admittedly ignored the instructions and continued to confront Officer HEPP.¹ Each escalation of use of force was in response to resistance and non-compliance by plaintiff RUIZ, **and** the use of force was intended to achieve a lawful goal of compliance and arrest. (Declaration of John Fritsch Ex. “E”: Joe Callanan Report: Paragraphs 8.06 through 8.09)

¹ It should be noted that plaintiff RUIZ is very familiar with the criminal justice system having served time in prison from February 2004 through August 8, 2007 for charges arising out of striking a pedestrian while operating a motor vehicle, and by reason of his admitted membership in the Norteños gang. These facts bear on the issue of whether plaintiff RUIZ reasonably expected Officer HEPP to have information about charges when RUIZ was arrested by Sgt. Celli, not Officer HEPP, and Officers HEPP and Wellington were clearly assigned to transport plaintiff RUIZ, nothing more. A reasonable inference is that plaintiff RUIZ did not reasonably expect Officer HEPP to have that information, and the actual reason for plaintiff RUIZ to attempt to question Officer HEPP was to continue his resistance and obstruction albeit in a different form than swinging tree stakes, yelling and seeking physical combat.

1 It should be noted that the “objectively reasonable” standard does **not** implicate
2 whether the officer had less intrusive alternatives available. The rationale that supports
3 this rule is practical and understandable:

4 “Requiring officers to find and choose the least intrusive alternative would
5 require them to exercise superhuman judgment. In the heat of the battle
6 with lives potentially in the balance, an officer would not be able to rely on
7 training and common sense to decide what would best accomplish his
8 mission. Instead, he would need to ascertain the *least* intrusive alternative
9 (*an inherently subjective determination*) and choose that option, and that
10 option only. Imposing such a requirement would inevitably induce
11 tentativeness by officers and thus deter police from protecting the public
12 and themselves. It would also entangle the courts in endless second
13 guessing of police decisions made under stress and subject to the
14 exigencies of the moment.” (*Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.
15 1994).

16 In the event, there is no evidence that another, less intrusive alternative was
17 available; would have been effective; and/or would have not increased the risks of
18 injury to plaintiff RUIZ.

19 It is anticipated that in an attempt to raise a triable issue, plaintiff RUIZ will
20 characterize the force used as closed fist and multiple blows. While the amount of
21 force transmitted by closed or empty handed physical force can vary widely, the
22 resultant injury furnishes the most compelling evidence about the amount of force
23 actually transmitted. In this case, the evidence of injury is that plaintiff RUIZ
24 experienced a very minor injury: assuming that the injury was not caused by his two
25 bicycle crashes or while falling after being tasered, he apparently experienced bleeding
26 that coagulated during the short five-to-ten minute ride to the Sonoma County
27 Detention Center. He did not experience pain. He did not need or receive health care
28 for the injury at any time, and there is no evidence from the Sonoma County Detention
Center supporting the conclusion that plaintiff RUIZ made any complaint or otherwise
needed medical attention upon his intake at that facility. And, although an imperfect
gauge, it is a measure of the comparatively minor amount of force experienced by
plaintiff RUIZ that the injury did not prevent him from seeking personal information
from Officer Wellington during the ride to the Detention Center for the purpose of

1 asking her out.

2 The reasonable inference is that the physical force applied by Officer HEPP
3 functioned as intended to distract plaintiff RUIZ from resistance and obstruction with
4 minimal injury, and that plaintiff RUIZ suffered a very minor, temporary, self-healing
5 injury. This outcome was consistent with good, proper police practices, and the injury
6 is not consistent with an application of excessive force.

7 Under the totality of circumstances, and especially given plaintiff RUIZ's level of
8 intoxication, resistance and combativeness, Officer HEPP's use of force was objectively
9 reasonable and consistent with proper procedure. (Declaration of John Fritsch: Ex. "E"
10 Callanan Report)

11 **B. IF THE COURT CONCLUDES THAT A CONSTITUTIONAL VIOLATION**
12 **OCCURRED, OFFICER HEPP IS ENTITLED TO APPLICATION OF**
13 **QUALIFIED IMMUNITY AND DISMISSAL OF THE COMPLAINT**

14 When a constitutional violation occurs, as alleged in plaintiff's complaint, "law
15 enforcement officers nonetheless are entitled to qualified immunity if they acted
16 reasonably under the circumstances." *KRL v. Estate of Moore*, 512 F.3d 1184, 1189 (9th Cir.
17 2008) (citing *Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)).

18 A police officer enjoys qualified immunity "unless the official's conduct violate a
19 clearly established constitutional right." *Pearson v. Callanan*, –U.S.–, 129 S. Ct. 808, 816
20 (2009). The concern of qualified immunity is to acknowledge that reasonable mistakes
21 can be made as to the legal constraints on particular police conduct. It is sometimes
22 difficult for an officer to determine how relevant legal doctrine....will apply to the
23 factual situation the officer confronts. *Saucier v. Katz*, 533 U.S. 194, 205, 121 S.Ct. 2151,
24 150 L.Ed.2d 272 (2001). Defendants will not be immune if, on an objective basis, it is
25 obvious that no reasonably competent officer would have concluded that a warrant
26 should issue; but if officers of reasonable competence could disagree on this issue,
27 immunity should be recognized. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The defense
28 of qualified immunity "shields government officials performing discretionary functions
from liability for civil damages 'insofar as their conduct does not violate clearly

1 established statutory or constitutional rights of which a reasonable person would have
 2 known". *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) citing *Harlow v. Fitzgerald*, 457
 3 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Because qualified immunity is "an
 4 immunity from suit rather than a mere defense to liability . . . , it is effectively lost if a
 5 case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105
 6 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

7 In excessive force cases, the inquiry remains whether "under the circumstances a
 8 reasonable office would have had fair notice that the force employed was unlawful, and
 9 whether any mistake to the contrary would have been unreasonable" *Boyd v. Benton*
 10 *County* 374 F.3d 773, 781 (9th Cir.2004). A reasonable officer under the same
 11 circumstances would have believed his conduct to be lawful since the actions taken
 12 were not "plainly incompetent" and were not a product of a knowing violation of the
 13 law. Officer HEPP contends that even if the amount of force was not objectively
 14 reasonable, any mistake as to the amount of such force that could be used under the
 15 particular circumstances was a reasonable mistake, and that Officer HEPP is entitled to
 16 qualified immunity.

17 **1. City Did Not Maintain a Policy, Custom or Practice, or Ratify or**
 18 **Condone Violative Conduct, Encouraging Excessive Force**

19 Municipal liability in section 1983 actions is "only appropriate where a plaintiff
 20 has shown that a constitutional deprivation was directly caused by a municipal policy."
 21 *Nadell v. Las Vegas Metro. Police Dep't* 268 F.3d 924, 929 (9th Cir. 2001). Four conditions
 22 must be satisfied:(1) that plaintiff possessed a constitutional right of which he was
 23 deprived;(2) that the municipality had a policy; (3) that this policy "amounts to
 24 deliberate indifference" to the plaintiff's constitutional right; and (4) that the policy is
 25 the "moving force behind the constitutional violation." *Van Ort v. Estate of Stanewich*, 92
 26 F.3d 831, 835 (9th Cir. 1996).

27 In the instant case, both defendants contend that plaintiff RUIZ did not
 28 experience a violation of his constitutional rights. Moreover, as to CITY OF SANTA

1 ROSA, Officer HEPP was properly trained as a patrol officer. (Ex. "F" to Declaration of
 2 Ryan Hepp: Basic and Intermediate Certificates of Completion of Peace Officer
 3 Standards and Training dated October 1,2007 CSR 000013-000016) Santa Rosa Police
 4 Department regularly evaluated the performance of Officer HEPP, and concluded that
 5 Officer HEPP performed to a high standard (Ex. "G" to Declaration of Ryan Hepp:
 6 Police Office Performance Evaluations CSR 000060-000098. Santa Rosa Police
 7 Department maintained an modern use-of-force policy. (Declaration of Ryan Hepp Ex.
 8 "H": General Order 01-02 - Use of Force) It should be noted that Officer HEPP's report
 9 of use of force was reviewed by a supervisor pursuant to departmental policy as well.

10 There no evidence that implementation of any policies or practice caused a
 11 constitutional violation nor can it be said that implementation of the policies amounted
 12 to "deliberate indifference".

13 **2. Neither CITY nor Officer HEPP violated the Bane Act.**

14 The Tom Bane Civil Rights Act establishes a private right of action against a
 15 person who interferes by threats, intimidation, or coercion with the plaintiffs "exercise
 16 or enjoyment" of federal or state rights. (Cal. Civ.Code § 52.1) In the instant case, the
 17 use of force was not excessive and was proper. Since there is no violation of federal
 18 constitutional rights, and there is no claim different from the allegation of violation of
 19 federal constitutional right, the Bane Act claim must fail.

20 **3. Officer HEPP Did Not Commit Common Law Battery.**

21 In considering a state law battery claim against a police officer based on excessive
 22 force in the course of an arrest, investigatory stop, or other seizure of a free citizen, the
 23 question is whether the officer's actions are objectively reasonable in light of the facts
 24 and circumstances confronting him, without regard to his underlying intent or
 25 motivation. To prevail in a state law battery claim against a police officer or in a federal
 26 claim of excessive use of force, a plaintiff must prove that the peace officer's use of force
 27 was unreasonable. *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516. The reasonableness
 28 standard of the Fourth Amendment to the United States Constitution, as applied to a

1 state law battery claim against a police officer based on excessive force in the course of
 2 an arrest, investigatory stop, or other seizure of a free citizen, is highly deferential to the
 3 police officer's need to protect himself and others. Because federal civil rights claims of
 4 excessive use of force are the federal counterpart to state battery and wrongful death
 5 claims against police officers, federal cases are instructive in considering such battery
 6 and wrongful death claims.

7 In the instant case, plaintiff cannot show that Officer HEPP's use of force was
 8 unreasonable and excessive, and the state law claim must fail.

9 **4. There is no Triable Issue of Fact Material to plaintiff's violation of the**
 10 **Convention Against Torture Count**

11 The Convention Against Torture ("CAT") prohibits signatory states, including
 12 the United States, from returning a person to a country where there is substantial
 13 evidence that he will be tortured. See *Al-Saher v. I.N.S.*, 268 F.3d 1143, 1146 (9th
 14 Cir.2001). To be eligible for CAT relief, plaintiff must show that it is more likely than
 15 not that he would be tortured if he is returned to another state. *Kamalthas v. I.N.S.*, 251
 16 F.3d 1279, 1284 (9th Cir. 2001).

17 The implementing regulations for the Convention Against Torture define torture
 18 as:

19 [A]ny act by which severe pain or suffering, whether physical or mental, is
 20 intentionally inflicted on a person for such purposes as ... punishing him
 21 or her for an act he or she or a third person has committed or is suspected
 22 of having committed, or intimidating or coercing him or her or a third
 23 person, or for any reason based on discrimination of any kind, when such
 pain or suffering is inflicted by or at the instigation of or with the consent
 or acquiescence of a public official or other person acting in an official
 capacity. 8 C.F.R. 208.18(a)(1).

24 Under the totality of circumstances, and especially given plaintiff RUIZ's level of
 25 intoxication, resistance and combativeness, Officer HEPP's use of force was objectively
 26 reasonable and consistent with proper procedure. There is no triable issue of material
 27 fact that plaintiff RUIZ would be entitled to CAT relief.

28 //

CONCLUSION

In closing, CITY OF SANTA ROSA and its Santa Rosa Police Department did not act with deliberate indifference and its policies are sound policies not causally related to plaintiff RUIZ's claims. CITY OF SANTA ROSA respectfully requests that the court grants its motion.

Officer HEPP acted objectively reasonably at all times and his use-of-force was reasonable. Officer HEPP respectfully requests that the court grant his motion on the grounds that plaintiff RUIZ's constitutional rights were respected, not violated. In the alternative, Officer HEPP respectfully requests that the court conclude that he is entitled to qualified immunity and dismiss the case.

OFFICE OF THE CITY ATTORNEY

/s/

Dated: May 5, 2010

John J. Fritsch
Assistant City Attorney
Attorney for Defendants
CITY OF SANTA ROSA; SRPD Officer RYAN
HEPP